



November 7, 2001

Ms. Tina Plummer
Open Records Coordinator
Texas Department of Mental Health Mental Retardation
P.O. Box 12668
Austin, Texas 78711-3761

OR2001-5152

Dear Ms. Plummer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 154522.

The Texas Department of Mental Health Mental Retardation (the "department") received two requests for information concerning the investigation of a complaint filed by a co-worker of the requestor. You claim that a portion of the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note that section 552.117 of the Government Code may be applicable to some of the submitted information. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the department may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those employees who timely elected to keep their personal information confidential, the department must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members. The department may not withhold this

information under section 552.117 for those employees who did not make a timely election to keep the information confidential. We have marked the type of information that may be withheld under section 552.117.

We next address your argument that section 552.101 excepts the requested information from public disclosure. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You assert that a portion of the requested information "might be considered confidential by law." However, you have not indicated, nor are we aware of, any law that would make this information confidential. Thus, with the exception of the information that falls under the purview of section 552.117, the submitted information may not be withheld from disclosure as information "confidential by law."

Section 552.101 also encompasses the doctrine of common law privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Here, the submitted documents relate to allegations of employee misconduct in the workplace. Although information relating to an investigation of misconduct may be highly intimate or embarrassing, the public generally has an interest in knowing the details of such an investigation. Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 444 at 5-6 (1986) (public has genuine interest in information concerning a public employee's job performance and the reasons for dismissal, demotion or promotion), 438 (1986) (work behavior of public employee and the conditions for his or her continued employment are matters of legitimate public interest not protected by the common law right of privacy). Applying the second requirement of the common law privacy test in this case, we find that the information you seek to withhold under common law privacy is of legitimate concern to the public. We conclude that the submitted information is not excepted from disclosure under common law privacy.

You also claim that the identity of witnesses may be withheld from disclosure under section 552.101. Although you do not explain with any specificity why the witness identities should be withheld, you refer to Open Records Letter No. 2000-0126 (2000) as an example of a ruling in which witness names were protected from disclosure. That ruling, however,

related to an investigation of sexual harassment, while the investigation here did not.¹ We therefore find that the identities of witnesses are not protected from disclosure under section 552.101. The remainder of the submitted information must be released to the requestor.

In summary, for those employees who timely elected to keep their personal information confidential, the department must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members. The remainder of the submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

¹The complaint referenced in the request dated August 21, 2001, alleged discrimination based on race and color. The September 10, 2001 request was related to a non-discrimination complaint. Sexual harassment is included under discrimination complaints on the Employee Complaint Form.

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/seg

Ref: ID# 154522

Enc. Submitted documents

c: Ms. Tina Rodriguez
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Austin, Texas 78702
(w/o enclosures)